M E M O R A N D U M

TO: All Interested Parties

FROM: Jay Wickersham, Noble & Wickersham LLP, and Robert Richie, Massachusetts Municipal Lawyers Association, for the Massachusetts Smart Growth Alliance and Zoning Reform Working Group

DATE: July 8, 2015

RE: Summary of zoning reform bill: S. 122, as filed by Senator Daniel Wolf and Representative Stephen Kulik

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Provisions of the zoning reform bill

Chapters 40A, 40X, and 41: Reforms applicable to all communities:

1) Allowable Zoning Techniques. The bill adds or expands definitions and authorizations for many useful zoning techniques, including cluster development, transfer of development rights, inclusionary zoning, natural resource protection zoning, and form-based codes. [Bill sections 1, 2 and 3]

2) Special Permits. Three significant changes are proposed, all of which would reduce the burden on local boards and applicants. The required vote is reduced from a super-majority to a simple majority (with local option to increase); the duration of a special permit is extended from a maximum of two years to a minimum of three years; and a process for extending a permit is established. [Bill sections 13, 14, 15, 16, 17, and 18]

3) Site Plan Review. Many communities already employ a form of site plan review (SPR), but because there are no explicit standards in the Zoning Act, uncertainties have plagued the SPR process. The bill adds a new section that standardizes SPR as follows: (1) decisions must be made within 95 days, with a public hearing optional; (2) when SPR overlaps with a special permit, the reviews must coincide; (3) approval is by simple majority; (4) approvals may be subject to conditions, including off-site mitigation in limited circumstances only; (5) duration shall be a minimum of two years; and (6) appeals shall be based on the existing record, not new evidence. [Bill section 19]

4) Variances. Variances offer a "relief valve" from zoning, since no local code can anticipate difficulties with every piece of land or personal circumstance. Variances are particularly helpful for small-scale residential projects involving renovations, additions, or infill development. But the current Zoning Act is overly restrictive for landowners and towns. As a result, some zoning boards approve almost no variances, while others grant them liberally but illegally. This section entirely rewrites the current variance provisions; it sets reasonable procedures and criteria while still maintaining a community's discretion to condition or deny a variance, including on grounds

of "self-created" hardship. The time within which a variance must be used is extended from one to two years, with one-year extensions allowed. **[**Bill section 23]

5) Vested Rights. It is appropriate and fair that when zoning changes, the law should protect development projects already in the pipeline, where a substantial investment of time and money has been made. In the Zoning Act, however, some of these protections are excessively protective, while others are unreasonably limited. The vesting loopholes for subdivisions and Approval Not Required (ANR) plans undermine thoughtful local planning and zoning modifications. Meanwhile, the vesting periods for projects seeking a building permit or special permit are difficult to obtain and unrealistically short. This section has been rewritten, based on extensive research into vested rights statutes in use around the country and American Planning Association model laws, to provide reasonable and standardized protections for development projects requiring building permits, special permits, and subdivision plans. The bill eliminates two vesting loopholes and modifies the third. The vesting periods for building permits and special permits are appropriately extended. [Bill sections 6, 7, 8, 9, 10, 11, and 12]

- Subdivision Plan Freeze: Only the proposed project is protected against zoning changes, rather than the land (as under current law). An applicant must apply for a definitive subdivision plan before the first published notice of public hearing on a proposed zoning change, and must ultimately obtain approval. But the overall length of the subdivision freeze has been maintained at eight years, unless a community seeks "opt-in" status under the new Chapter 40Y.
- ANR Plan Freeze: Under current law, the endorsement of a simple ANR plan for lots fronting on a public way – even a perimeter plan or a plan showing only a slight line change to an existing parcel – freezes any zoning use change for three years. This device was recently considered in the City of Northampton to preserve rights to build a porn store. It is eliminated.
- Three Lots in Common Ownership Dimensional Freeze: Up to three pre-existing adjoining lots under common ownership are protected against any zoning dimensional changes for five years after any zoning change. Reportedly, this was added by a legislator in the 1970s at the request of a constituent, to protect the constituent's land! It has vexed cities and towns for over 35 years. It is eliminated.
- Obtainable, Extended Freezes for Special Permits and Building Permits. All developments require building permits and most large projects require special permits – yet under current law, both the duration of such permits and the ability to protect against zoning changes, is unrealistically limited. The bill liberalizes access to zoning freeze protection; an applicant must apply for a building or special permit before the first published notice of a public hearing on a proposed zoning change. The duration and vesting period for building permits is increased from six months to two years, and for special permits from two to three years.

6) Development Impact Fees. Rationally-based impact fees are predictable for developers and can reduce local opposition to some development projects, because there is confidence that projects will bear their fair share of impacts on public facilities. This allows more types of development to be permitted as-of-right instead of undergoing the lengthy and costly special permit process. Despite being a commonly-used regulatory tool across the country, impact fees

are rarely used in Massachusetts due to troublesome case law and no mention in statute. This new section in the Zoning Act authorizes development impact fees, based on in-state models (Medford and Cape Cod Commission), prevailing national practice, and federal case law. The bill clearly lists the public capital facilities for which impact fees may be assessed. Affordable housing projects and agriculture are exempted from impact fees. Fees must be paid into a dedicated trust fund and used within 10 years. [Bill section 20]

7) Inclusionary Zoning. Inclusionary housing programs that require the creation of affordable housing in development projects can increase diversity in local housing opportunities and help to meet local requirements under Chapter 40B. Although it is used by communities around the state, this essential smart growth tool is not currently formalized in the Zoning Act. This new section is based on best current practices. Off-site units, land dedication, or funds may also be provided in lieu of on-site dwelling units. The upper limit of affordability is households earning up to 120% of the Area Median Income (AMI). Inclusionary zoning may require some or all of the affordable units to be eligible under Chapter 40B (i.e., units limited to households with incomes up to 80% of AMI). Affordable units must be price-restricted for no less than 30 years. **[**Bill section 21]

8) Master Planning.

- Contents of Master Plans**.** The section is rewritten to accomplish the following objectives: (1) plan elements reflect the language of the state's Sustainable Development Principles, including public health considerations; (2) all communities must complete five required elements (goals and objectives, housing, natural resources and energy management, land use and zoning, and implementation), but are free to choose among the other seven optional elements; (3) superfluous data collection is discouraged; (4) all elements must be assessed against a regional plan, if any; (5) a public hearing is required before adoption; and (6) the plan must be adopted by the local planning board and the local legislative body. [Bill section 27]
- Legal Effect of Master Plans**.** Current Massachusetts law does not require zoning to be consistent with a local master plan. As a result, many municipalities have not created or updated their plans. The bill makes master plans an option for municipalities. But to incentivize thoughtful local planning, the bill also states that if local zoning is challenged in a lawsuit, and the court finds that the challenged provision is not inconsistent with a local master plan that has been certified by the applicable regional planning agency, then the provision shall be deemed to serve a public purpose. [Bill section 43]

9) Notice to Boards of Health. Although local boards of health receive notices of public hearing for subdivision projects, under the current Zoning Act they do not receive notices of projects seeking zoning approvals. This has been changed, so that boards of health will receive notice and be able to comment on variances, site plan reviews, special permits, and other approvals. **[**Bill section 24]

10) Other Procedural Reforms.

- Land Use Dispute Avoidance. Although informal dispute resolution processes may occur now, there is no set process laid out in the Zoning Act, and no relief from either legal "discovery" or the open meeting law. This new section in the Zoning Act offers an off-line avenue for applicants, municipal officials, and the public to work with a neutral facilitator to try to resolve difficulties in a prospective development project, so that the formal approval process may later be successful for all. **[**Bill section 22]
- Appeals. Resolving appeals under current law is often expensive and slow, undermining the predictability and authority of the local process for officials, developers, and residents alike. The bill streamlines the appeals language for site plan review, special permits, and subdivisions; provides for a record-based decision (rather than a decision based on new evidence) by the court evaluating a local decision; and expands the jurisdiction of the Land Court permit session to include residential, commercial, industrial, and mixed-use projects. [Bill sections 19, 39, 41, 42, and 44]
- Zoning Amendments**.** The current super-majority requirement (two-thirds) to adopt or amend local zoning is an undue burden for Massachusetts cities and towns, one that is unique in the U.S. The bill would allow communities to lower the vote from the super-majority default anywhere down to a simple majority. And the lower threshold would be used for zoning amendments that the planning board finds to be consistent with a master plan, if any, and that are not subject to a landowner protest. Once reduced, the vote majority may subsequently be raised or lowered by the majority then in place. Any changes do not become effective until six months have passed. [Bill sections 4 and 5]

11) Consolidated Permitting. Development proposals often need multiple local permits from multiple local boards, each with its own substantive and procedural requirements. The new Chapter 40X would allow applicants for larger, more complex projects (at least 25,000 square feet or 25 dwelling units) to employ a consolidated permitting process. This would ensure that local boards receive common information about the project and that they have the opportunity to bring all decision-making bodies together at the beginning of a project review at a consolidated hearing. More efficient reviews could result, benefitting all parties to the development review process. At the same time, each board would retain the authority to make an independent decision in accordance with its own standards. [Bill sections 25 and 40]

12) Minor Subdivisions and Approval Not Required (ANR) Projects. Current Massachusetts law prevents communities from effectively planning or regulating the development of roadside land, through the uniquely permissive ANR process. No other state law allows unregulated roadside development in this fashion. At the same time, small residential subdivisions with a new road must undergo the same process as those with 50 or 100 lots. The bill permits a community to eliminate the ANR loophole if it creates a less onerous minor subdivision review process for projects with six or fewer lots. A separate procedure has been developed to address minor lot line changes. [Bill sections 28, 29, 30, 31, 34, 36, 37, and 38]

- ANR Reform. Communities wishing to retain ANR may do nothing and continue, but those desiring more control of these land divisions may now regulate them as minor

subdivisions. However, until a planning board adopts rules and regulations for minor subdivision review, the old ANR process remains in effect.

- Minor Subdivisions. Minor subdivisions must be defined under local regulations to include up to six new lots (a community can raise the threshold). The time limit for review is either 65 or 95 days, compared with 135 days for a full subdivision. A public hearing is optional. Standards may not exceed those for regular subdivisions, and requirements for roadway width may typically not exceed 22 feet.
- Lot Line Changes. Because the ANR device is routinely used to make small changes to property lines, a suitable replacement mechanism was needed. A new section permits the recording of plans for minor lot line changes, subject to specific conditions.

13) Subdivisions. The bill makes two other changes to the Subdivision Control Law:

- Subdivision Roadway Standards**.** Many local subdivision regulations require unjustifiably excessive roadway standards. These may adversely affect aesthetics, increase stormwater runoff, and inflate housing costs by imposing undue costs on the developer. The bill establishes a rebuttable presumption that roadway standards exceeding those applicable to the construction or "reconstruction" of publicly-financed roadways are excessive, while defining a "safe harbor" for roadway widths up to 24 feet. [Bill section 32]
- Neighborhood Parks**.** The Subdivision Control Law is modified so that local subdivision regulations may require a dedication of up to 5% of a subdivision for park use benefitting the lots within the subdivision. This provision is not intended and can't be interpreted to require transfer of ownership of such park areas to a governmental unit. **[**Bill sections 33 and 35]

Chapter 40Y, Planning Ahead for Growth Act: Specific smart –growth tools applicable on a voluntary basis to opt-in communities only:

14) Planning Ahead for Growth Act [opt-in]. Current zoning codes are not resulting in smart-growth development that creates adequate new housing and jobs across the Commonwealth, while protecting environmental resources and community character. The "town and country" landscape of Massachusetts is being lost to sprawl development patterns. The new chapter 40Y provides strong incentives for communities to allow prompt and predictable by-right housing and commercial development permitting, focused in appropriate smart-growth locations, coupled with environmental and open space protections. Participating municipalities will get access to additional regulatory and fiscal resources and tools to realize their plans for sustainable development. To obtain "opt-in" status under Chapter 40Y, a community (or group of communities) must take the following actions, and demonstrate to the regional planning agency (RPA) that it has met the requirements of this section. Oversight, implementing regulations, and resolution of disputes would be through the Secretary of the Executive Office of Housing and Economic Development. [Bill section 26]

- Establishing a housing development district(s) in a smart-growth location(s) that can accommodate, through by-right development, a 5% increase the community's total

number of existing housing units. Minimum densities are set for single-family, duplex-triplex, or multi-family housing.
- Establishing an economic development district in a smart-growth location(s) that permits prompt and predictable permitting of commercial / industrial development.
- Mandatory use of open space residential design (OSRD) for developments of 5 units or more on land zoned for a minimum lot-size of 40,000 square feet or greater per unit.
- Mandatory use of low impact development (LID) techniques for developments that disturb over one acre of land.

The following regulatory and financial tools would be authorized and available for a community's use after it has opted in:

- Enhanced use of impact fees to support public schools, libraries, municipal offices, affordable housing, and public safety facilities.
- Authorization to enter into development agreements.
- Reduction of the vested rights period for subdivisions from 8 to 5 years.
- Adoption of rate of development measures (annual caps on building permit issuance) in areas inside and outside of housing development districts.
- Adoption of natural resource protection zoning (NRPZ) at area densities of five acres or more per dwelling unit to protect identified lands of high natural or cultural resource value.
- Preference for state discretionary funds and grants; priority for state infrastructure investments, such as water and sewer infrastructure, school building funds, and biking and walking facilities; and requirements that the state take into consideration regional plans and local master plans in its capital spending.